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No. 882.

IN THE

Supreme Court of the United States

October Term, 1966.

WALTER C. WRIGHT, JR.,

Petitioner,

v.

PRESS PUBLISHING COMPANY, et al.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey.

REPLY BRIEF.

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INDEX

PAGE

As to Respondents' Statement of Questions Involved .. 2

As to Respondents' Statement of the Case 5

As to Respondents' Argument 7

CITATIONS

CASES:

Kulbacki v. Sobchinsky, 38 N. J. 435, 185 A. 2d 835 (Sup. Ct., 1962) 3

New York Times Company v. Sullivan, 376 U. S. 254 (1964) 2, 3, 4

OTHER AUTHORITIES:

Rule 23, 1 (f) 5

Stern & Gressman, *Supreme Court Practice* (3rd ed., 1962) 5

"Landmark Guidelines by Bar and Press," *Trial*, Dec./Jan. 1966-67, p. 62 8

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AS TO RESPONDENTS' STATEMENT OF QUESTIONS INVOLVED.

Petitioner agrees with respondents: the "Statement of Questions Involved" in this petition is different from the "Statement of Questions Involved" contained in the brief filed with the Superior Court of New Jersey, Appellate Division. The first two questions were omitted entirely from the brief filed with the latter tribunal. The other questions were presented, but not as Federal questions. This Court is already familiar with the reason why petitioner temporarily abandoned the first two questions at the intermediate appellate level; there is no use in presenting arguments if the court refuses to consider the evidence (p. 8 of Pet.). The other four questions were presented as non-constitutional questions because that is all they were until the Appellate Division rendered its opinion, changing the picture, as will appear.

In the petition (p. 18) it is stated that the trial court gave the opinion in the case of *New York Times Company v. Sullivan*, 376 U. S. 254 (1964), "the strictest interpretation, namely, that malice may be proved only through *direct* evidence of knowledge of falsity or reckless disregard." This is a misstatement. At the time the trial court ruled on the interrogatories (involved in Questions 3 and 4), the *Times* case had not even been decided. It was decided on March 9, 1964, whereas the interrogatories involved in the present appeal had all been ruled on by February 27, 1964. (R. 318-28 contains the last reference to them.)

Since the trial court's rulings on the interrogatories were not based on the principles enunciated in the *New York Times* case, there were no constitutional questions concerning Questions 3 and 4 when the appeal was taken to the

Appellate Division. Nor were there any constitutional questions concerning Questions 5 and 6, since the trial court, in denying the pertinent requests to charge, had given no reasons for his rulings and, therefore, it could hardly have been contended that said Requests had been denied because of the application to them of the principles set forth in the *New York Times* case.

When the Appellate Division got finished with the case, what had before been non-constitutional questions had been turned into constitutional questions, since it based its whole decision (p. 10a of Pet.) on the *New York Times* case. The case of *Kulbacki v. Sobchinsky*, 38 N. J. 435, 185 A. 2d 835 (Sup. Ct., 1962) was also cited, but it was cited merely for the proposition that an appellate tribunal will not reverse a jury's finding where "such finding finds adequate support in the record." Therefore, the one sustaining pillar of the Appellate Division's decision is the *New York Times* case, and, if the holding in that case is insufficient authority for the affirmance of the trial court's action in striking petitioner's interrogatories and denying his requests to charge, the judgment should be reversed.

The petitioner raised these constitutional questions at the first opportunity: on the Petition for Certification filed with the Supreme Court of New Jersey. He also raised them on the appeal to that court, but, unfortunately, it dismissed the appeal without getting into the merits.

The reason these questions are constitutional ones is that the decision in the *New York Times* case rests on freedom of the press. If freedom of the press was not involved in the present case, or if the principles of the *Times* case were too broadly interpreted (and, therefore, improperly applied), it is hoped that this Court will correct the miscarriage of justice. For, as pointed out in the *Times* case (at p. 285):

> "This court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied."

The fact that the Appellate Division was applying the principles of the *Times* case and not just its prestige is apparent from the use of the term "actual malice" instead of just plain "malice". This is a term which has no significance in the law of libel except where there is a question concerning punitive damages or a case to which the rule of the *New York Times* case applies. Since there was no specific question involving punitive damages, the Appellate Division must have been referring to the term as used in the *Times* case. As he has already indicated in the closing pages of his petition, the petitioner does not think the rule of the *Times* case was meant to be applied to cases in which no public act was involved (but merely a private conversation in which the petitioner was telling a newshawk "No comment"). However, if the ruling of the *Times* case is to be applied, petitioner hopes it will be applied with a mallet instead of a sledgehammer. In the petitioner's opinion, the *Times* case established the rule that malice could not be inferred from the falsity of a libelous publication, not that you have to prove knowledge or reckless disregard through direct evidence.

Since the respondents contend that the questions presented in the present petition are different from the questions presented to the Supreme Court of New Jersey, the petitioner is filing ten copies of the Petition for Certification filed with that court and ten copies of his Brief on the appeal (and also ten copies each of the Brief and Supplemental Brief filed with the Appellate Division). It is petitioner's belief that it would have been improper for him to have filed these papers as part of the record, since briefs (including petitions for certification, judging from the way

they are prepared in New Jersey) are not considered part of the record. Stern & Gressman, *Supreme Court Practice* (3rd Ed., 1962), p. 225. And, if they are not part of the record, they certainly are not to be quoted from or summarized under Rule 23, 1 (f).

AS TO RESPONDENTS' STATEMENT OF THE CASE.

Respondents allege that the petitioner's Statement of the Case "is so inadequate and distorted that it is necessary for respondents to restate case" (p. 5). If it is so inadequate and distorted, why did respondents not point out some of the defects? The only specific criticism is directed at words which do not even appear in the Petition, [redacted] Respondents assert (at p. 7) that they take issue with petitioner's statement "that he was constantly harassed by newspapermen, particularly the defendants' (pp. 2:10). There was no such proof." Petitioner invites the Court's attention to R. 189-31 to 190-10, containing the following cross-examination of petitioner by defense counsel:

> "Q. But you don't say that is false?
>
> A. No, but the main reason the move was taken wasn't to eliminate conflicting statements, but to prevent the press from tearing us apart by getting statements from each person, putting them in the newspapers. This is what Cape May is going to do, when we didn't even know ourselves yet, and it puts everybody in a state of confusion.
>
> Q. I don't want to get into a lot of semantics and fancy words. Isn't that phrase that you just referred to substantially what you said in a telephone conversation with Mr. Comerford? Let's look at it in a big way.

A. It is part of it, but the main purpose is to prevent them from taking a statement from me or one of the other councilmen and putting it in the newspaper and saying this is the policy of the council, when the council hasn't met yet, so it comes in as part of it when we haven't had a chance to meet and decide, but the main purpose is to eliminate these news articles tearing the town apart."

That the trouble emanated mainly from the respondents is apparent from petitioner's testimony at R. 161-13, which reads: "The displeasure was something that had been going on for quite a while and it was with the Atlantic City Press . . ."

If anybody's Statement of the Case is distorted, it is the Respondents.' At p. 8, right after referring to "a 'news blackout' of municipal affairs of Cape May City," Respondents state: "This situation was in effect ~~during the~~ publication of said articles, so far as the plaintiff was concerned." The situation which was in existence during the publication of said articles was not "a news blackout of municipal affairs of Cape May City" (as respondents would have the Court believe), but rather a situation of the petitioner and probably the other two councilmen refusing to comment on matters of policy until they worked out some system of dispersing press releases. If the Court will read the question (at R. 157-13) which precedes petitioner's statement, it will realize that the respondents could not possibly have thought that the petitioner was referring to the situation described in their brief. And, if the Court wishes to see under what circumstances "gag action" and "blackout" would be synonymous terms (p. 8), its attention is invited to R. 159-33. (The citations in respondents' brief are to the typewritten transcript, not to the printed version.)

Psb 11:23 (at p. 8 of respondents' brief) refers to petitioner's Supplemental Brief on the appeal to the Appellate

Division. Ten copies of this are being filed at this time so that the Court can see for itself what was conceded by the petitioner. Item #45 on p. 11 states that "the *most* that the defendants could be held to have proved was a 'dim-out' (concerning council's policies for the future). . . ." (Emphasis added). If there was a "dim-out," it was only a dim-out as to council's plans for the future until the councilmen had had a chance to work them out.

AS TO RESPONDENTS' ARGUMENT.

At p. 10 of their brief, respondents state that "the trial took 19 days, from February 13th to March 24, 1964." This is true, but it was a consolidated trial. Testimony in the action with which the present appeal is concerned was completed by March 12 (as shown at R. 634-27). The rest of the time was devoted to respondents' action against the present petitioner.

The 19 or 20 articles referred to by respondents must refer to the articles as to both actions. Respondents (at p. 10) state that, since petitioner offered only nine articles, "it is fair to infer that the other 10 or 11 were unobjectionable." This is not a valid inference. Petitioner would hardly be permitted to offer articles which relate to the other action. Both actions were tried together, but they are considered as separate actions on the appeal.

Respondents state (at p. 10) that petitioner "has never pointed out anything objectionable in said 9 articles." Have they read the brief petitioner filed on appeal to the Supreme Court of New Jersey? The question concerning the prejudicial effect of these newspaper articles has never been considered on the merits.

As to respondents' contention that having a newspaper

gives them the privilege to publish a daily account of their own trial, petitioner urges the Court to consider the following guidelines recently adopted by the bar and the press in the State of Washington (as reported in "Landmark Guidelines by Bar and Press", *Trial*, Dec./Jan. 1966-67, p. 62):

> "Litigants in civil causes, including causes having special news value because of public interest, are as much entitled to a fair trial by an unbiased jury as is a criminal defendant, . . .
>
> Jurors summoned to decide questions on civil liability or damages should be free from public clamor *and special influences.*" (Emphasis added.)

Freedom of the press does not require that newsmen be permitted to fight their court cases out in the newspapers; justice does require that they be restrained from doing so.

Respectfully submitted,

WALTER C. WRIGHT, JR.,
Petitioner, Pro Se.

Dated: February 6, 1967.